IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No 794 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE C.K.BUCH

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

---

ADAMBHAI SULEMANBHAI AJMERI

Versus

UNION OF INDIA

---

Appearance:

1. Special Criminal Application No. 794 of 2004

MR HASHIM QURESHI for Petitioner No. 1-3

..... for Respondent No. 1,3-5

MR AD OZA, LD.PUBLIC PROSECUTOR for Respondent No.2

---

CORAM : HON'BLE MR.JUSTICE C.K.BUCH

Date of decision: 20/09/2004

ORAL JUDGEMENT

Heard Mr.Hashim Qureshi, learned counsel appearing for the petitioners and Mr.A.D. Oza, ld. Public

Prosecutor, appearing on behalf of the respondent no.2-State.

2. This matter was listed for admission hearing on 16th September, 2004 and the Court has heard Mr.Qureshi on length on that day; and Mr.A.D. Oza also made submissions clarifying the contingencies emerging from the record.

3. Considering the totality of facts and circumstances emerging from record as well as the submissions made by Mr.Qureshi, a pointed query was raised by the Court as to whether the petitioner is interested in a reasoned order or would like to withdraw the petition. On that day, Mr. Qureshi requested the Court to defer the order so that he can get instructions from the petitioners and especially the person who has sworn the affidavit in support of this petition. Today according to Mr.Qureshi, the person instructing him in the matter is present and on instructions received from the deponent i.e. Ahmed Hussain Ismailbhai Mansuri, father of the petitioner no.2, he states that the petitioners are interested in a reasoned order. Even otherwise, the Court is suppose to pass a reasoned order unless submitted.

4. The present petitioners have approached this Court with a petition containing certain allegations and sensitive statements against the State of Gujarat and one officer and also the Investigating Agency. Some infirmities, mode, method and manner in this regard are also found in the averments. By invoking the jurisdiction of this Court under Articles 226 and 227 of the Constitution of India, the petitioners have prayed for the following reliefs :

"(A) This Honourable Court may be pleased to issue a writ of mandamus or a writ in the nature of mandamus, and/or a writ in the nature of certiorari or a writ in the nature of certiorari or any other writ, order or direction by directing to the respondents that the investigation carried out by respondents no.3,4 and 5 in C.R. No.I-314 of 2002 registered with Sector 21, Police Station is not satisfactory, suffers from irregularities and lacunas and of very poor quality. Therefore, be pleased to direct that further investigation be carried out in the subject matter under Section 173(8) of the Code of Criminal Procedure, 1973 by C.B.I.

(B) This Honourable Court be pleased to hold that since the present case has international ramifications, and it involves the sentiments of the people all over the country, the CBI is the proper agency to investigate the same.

(C) Pending admission hearing and final disposal of the petition, this Honourable Court be pleased to direct the respondents no.1 and 2 to avail the record of investigation carried out by Srinagar Police as well as the investigation carried out by Anti Terrorist Squad, Gujarat in the subject matter.

(D) During the pendency of this petition this Honourable Court may stay the trial of the present case which is registered as POTA case No.16 of 2003 in the Special POTA Court at Ahmedabad."

5. The aforesaid reliefs are prayed in respect of the offence registered vide C.R. No.314/2002 with Sector 21, Police Station, Gandhinagar, qua bloodshed attack made on the people visiting 'Akshardham' temple of Swaminarayan Sect, headed by 'Bochasanvasi Akshar Purshottam Sanstha'. Some 35 persons including totally innocent visitors have lost their lives in the incident. One of the contentions of the petitioners is that initially the Anti Terrorists' Squad of State of Gujarat (for short 'ATS') was entrusted with the investigation but the same could not reach any conclusion and the said agency ultimately decided to drop further exercise and decided to file summary report and ultimately the summary report was filed.

6. The grievance of the petitioners is that without any formal permission from the Court or a formal complaint, Crime Branch, Ahmedabad, started investigating activity and ultimately arrested the petitioner nos.1 and 2 with three other persons and those three persons subsequently have been branded as accused persons by the police. Thereafter, the Police of State of Gujarat invoked the provisions of the POTA, 2002 and the say of the petitioners is that by dubious method and especially by exercising physical and mental pressure tactics, the police recorded the confessional statements of the accused persons. But it is not a matter of dispute that all the statements thereafter have been retracted by the accused and it is the contention of the petitioners that these statements were recorded when the accused persons

were remanded by the Investigating Officer under unusual threat and force. The learned Presiding Judge dealing with the cases where the accused have been chargesheeted or facing prosecution under the POTA, 2002, was requested by the petitioners to pass appropriate orders transferring investigation to the CBI. The learned Presiding Judge, as averred in this petition, has not acceded to the request advanced by the petitioners vide application Exhs.31 and 33. The operative paragraph is relevant for the purpose and, therefore, it would be beneficial to reproduce the same as under :

> " As far as the request for the investigation to be carried by the CBI is concerned, this Court has already passed an order vide Exh.31 and, hence, nothing further remains to be done. Thus, the written retracted statements need to be taken on record of the case."

7. By this order, it is apparent that despite of rejection of the request while disposing of the application Exh.31, once again similar prayer was made by another application vide Exh.33 before the learned Presiding Judge. On 25th November, 2003, ultimately, the DCB Police Station, Ahmedabad, filed a chargesheet against the accused persons and a copy of the chargesheet is on record at Annexure-D, pg.49. Obviously, after filing of the chargesheet, the petitioners were supposed to face the prosecution but as it was open for the accused, one of the accused had filed an application under Sections 227 and 228 of the Criminal Procedure Code for discharge, however, the same was dismissed. Thereafter, the learned Presiding Judge framed charges against all the accused persons on 17th June, 2004.

8. On plain reading of the petition, it appears that certain questions, on reading the papers of investigation supplied to the accused, remain unanswered and, therefore, there is ample scope of further investigation and when the DCB Police has filed a chargesheet, the fair and impartial justice can be made only by the third independent Investigating Agency. Therefore only, the petitioners have prayed that further investigation be ordered and the same be handed over to the CBI. It is not necessary for this Court to comment upon the allegations as to whether there is any material evidence against the accused persons in the police papers or not; because it may prejudice either the present petitioners or the prosecution. Whether the Investigating Agency has

satisfactorily collected evidence as to the conspiracy to attack 'Akshardham' temple is there or not; or whether it was hatched simultaneously in Ahmedabad, Hyderabad, Srinagar or in Riyadh is again a question, which requires to be answered by the prosecution while leading evidence against the present petitioners. If the trial Court finds that there is no legal evidence, obviously the petitioners will get advantage of that situation. But it will be difficult for the Court to conclude, on reading the documents attached with the petition at Annexure-D that the investigation is either incomplete or in any way prejudicial to any of the petitioners. The petitioners have raised several questions and these questions are mentioned in Ground 'F' (pg.16) to the memo of the petition.

9. To appreciate the say of Mr.Qureshi, it would be appropriate to mention some of the questions raised with a view to point out the alleged infirmity in the investigation :

(i) Who were the conspirators in the conspiracy alleged to have been hatched at Hyderabad ? Whether they came at Ahmedabad ? If yes, then the persons killed were the same one or different ?

(ii) The conspiracy, which is alleged to have been hatched at Shrinagar, was for Akshardam or for any other purpose ?

(iii) What is the link between the conspiracy hatched at Riyadh and Shrinagar and vice versa ?

(iv) As per the story narrated by the present investigating officer that the target was the Chief Minister of Gujarat, Narendra Modi, but surprisingly the assailants entered into Akshardham Complex instead of reaching the Chief Minister's place."

10. The motive in the mind of conspirators is not to be explained but the same can be inferred from the accused conspirators. It will be difficult for this Court to answer as to why the assailants, if were having an idea of attacking the 'Akshardham' complex then why they did not enter right into the most sensitive area and opted to roam into an open ground of the 'Akshardham' complex, a religious place of worship, for a long time; why they did not act swiftly but spent hours in a

relaxing condition, is another question is also posed.

11. I am afraid that no agency can squarely reply these questions even if the investigation is handed over to the third independent Investigating Agency. It would not be either legal or proper for the Court to comment upon these aspects. This may drag this Court into disputed questions of facts that may have serious impact on investigation and the trial. What was the motive of the accused persons or actually what they were contemplating can be answered by the persons who were involved in the said crime or the persons behind the curtains i.e. conspirators. From plain reading of the chargesheet i.e. Chalan, it is very clear that this is not an individual wrong committed by two or three persons alleged to have been entered into the temple but they must have been facilitated by more than one individual or a group of persons; and according to the Investigating Officer, they are now able to trace some of them and present petitioners are two of them. It is true that the dead bodies of the persons killed inside the temple by the commandoes were fully covered, say stained with mud and dirt, but the point raised before the Court by the present petitioners is that in that situation how can a piece of paper i.e. chit, recovered by police from the dead bodies has no such stains as a question. The Court is able to appreciate that the petitioners intent to convey this Court that the document i.e. chit, must have been planted by the Investigating Agency but ultimately that being a document, the prosecution shall have to prove that document in accordance with law and evidentiary value of the same, even if it is proved, has to be assessed by the trial Court on available evidence. The reasons assigned by the petitioners for directing further investigation are neither found convincing nor it is possible to conclude that now if at this stage the CBI is asked to enter into this area of investigation, the CBI can make any progress putting new dimensions in the actual exercise done by the Investigating Agency, on the contrary, this may hamper the trial in waiting progress.

12. It is likely that the arguments that are advanced before this Court must have been advanced before the learned Presiding Judge, POTA Court at Ahmedabad while hearing the applications at Exhs.31 and 33. Some of the accused namely Abdulla-miya Yasin-miya Kadri and others, represented by the defence counsel Mr.Mustak Saiyed, had prayed before the learned Presiding Judge that the accused persons may be supplied with documents and the papers of investigation with the report of ATS, Gandhinagar. One of the grievances of the petitioners is

that these documents are not supplied to the petitioners and non-availability of the documents with the accused while facing prosecution of a very serious charge may create serious prejudice to them and trial would not remain a fair trial. Of course, a copy of the order passed below the application is not produced by the present petitioners but it is always open for the accused to get the document produced which is there in the custody of the prosecuting agency by getting the summons issued before cross-examining any of the prosecution witnesses at any appropriate stage. This would not give rise to a reason to either order further investigation or to hand over the same to the third independent Investigating Agency.

13. It is satisfactorily clarified by Mr.A.D. Oza, ld. Public Prosecutor, that this is not a case wherein it is possible to infer that the investigation is substantially carried out by the present complainant. The facts reveal that initially Mr.Toliya, Police Inspector, LCB, Gandhinagar, was dealing with the investigation and the complaint was registered by one Mr.G.L. Singal, Dy.S.P., Gandhinagar. Considering the relevant date, the investigation remained with another officer from 3rd October, 2002 to 29th August, 2003. Thereafter, when Mr.Singal was with City Crime Branch, he was entrusted with the investigation on 29th August, 2004 and as he was the only Asstt. Commissioner of Police, completed investigation on 25th November, 2003.

14. Placing reliance on the ratio of the decision of the Apex Court in the case of Anti-Corruption, Tiruchirapalli,T.N. v. V.Jayapaul reported in 2004(5) SCC 223, it is submitted that unless it is brought satisfactorily on record that there is an element of bias and that has prejudiced the interest of the accused, there is no bar in handling the investigation by the same police officer. One of the points advanced by Mr.Qureshi before the Court is that the officer who chargesheeted the accused persons is the complainant. It is pointed out by Mr.A.D. Oza, ld.Public Prosecutor, that incidently as the crime had occurred in capital Gandhinagar, where he was posted as Dy.S.P., so under compelling circumstances he has filed the complaint and subsequent part of investigation was otherwise handled by other officers from 25th September, 2002 to October, 2002 and between 3rd October, 2002 to 29th August, 2003. The officer against whom the allegations are made i.e. orig. complainant, again entered on 29th August, 2003. It may be that certain facts have seen light after that date.

15. It is not necessary to reproduce the relevant parts of the decision of the Apex Court in the case of Anti-corruption v. V.Jayapaul, that are there in paragraph nos.4,6 and 13 of the decision. However, it is relevant to note that even still it is open for the petitioners to satisfy the trial Court that the entrustment of investigation to Mr.Singal again in the month of August, 2003, has ultimately resulted into serious prejudice to them. In view of the above, the Court is of the view that there is no merit in this petition and, therefore, the same deserves to be dismissed.

15. For short, as this Court is not convinced that further investigation is required and that the same is required to be transferred to the CBI, this petition is dismissed in limine.

( C.K. Buch, J)

Aakar